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No. (1)

Supreme Court, U.S.
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In The
Supreme Court of the United States

HARRIS COUNTY BAIL BOND BOARD;
HARRIS COUNTY,

Petitioners,

v.

CARL R. PRUETT; SCOTT MARTIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This Court has held that when a state regulation implicates First Amendment rights, the Court "must balance those interests against the State's legitimate interest in regulating the activity in question". Further, the Court has stated that a "less-restrictive-alternative analysis" has never been a part of the inquiry into the validity of a time, place, and manner regulation. In the instant case the Respondents attacked the constitutionality of a state law which, in part, restricts solicitation of bonding business related to an individual with an outstanding arrest warrant that has not been executed. The Court of Appeals held that this part of the statute is not narrowly tailored, because it prohibits solicitation of targets "days, weeks, or even months after warrants are issued." Further, although the Texas Legislature tailored the statute by excluding contact related to Class C misdemeanors from the coverage of the statute, the Court of Appeals held that the breadth of crimes still covered by the statute is "simply too broad".

The questions presented are (1) whether the failure to impose a time limit on the prearrest restriction renders the statute unconstitutional, even if a time limit would defeat the purpose of the statute in certain cases and (2) whether the Court of Appeals' requirement that the Legislature allow solicitation of certain Class A and B misdemeanor targets as a condition for constitutionality is contrary to this

QUESTIONS PRESENTED – Continued

Court's precedents which do not permit invalidation of a preferred remedial scheme because some alternative solution is marginally less intrusive.

2. The Court has stated that a prevailing plaintiff in a civil rights case should ordinarily recover an attorney's fee "unless special circumstances would render such an award unjust". In the instant case the Respondents attacked the constitutionality of a state law. Petitioners did not promulgate the law or enforce it against the Respondents. The Respondents sought prospective relief. Consequently, Petitioners argued that, because the only action taken by them was to defend this action, special circumstances exist which would render an award of any attorney's fees against them "unjust". The Court of Appeals held that the Petitioners failed to make an extremely strong showing of special circumstances, stating that even defendants lacking culpability should pay attorney's fees.

The question presented is whether a local enforcement authority's lack of responsibility for an alleged constitutional violation can be a circumstance which would render an award of attorney's fees unjust.

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PETITION FOR A WRIT OF CERTIORARI

The Harris County Bail Bond Board and Harris County respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 499 F.3d 403. The opinion of the district court is reported at 400 F. Supp.2d 967. The district court's order on the issue of attorney's fees is unreported. Each of these opinions is reproduced in the Appendix to this petition.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and judgment on August 28, 2007. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1). In accordance with Rule 29.4(c), Petitioners state that the constitutionality of a Texas statute has been drawn into question in this case and 28 U.S.C. § 2403(b) may apply. A true and correct copy of this petition has been served upon the Attorney General of Texas. Although a copy of the Original Complaint was served upon the Attorney General, Petitioners do not believe that the lower courts certified to the

Attorney General the fact that the constitutionality of a Texas statute was drawn into question.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved in this case, Tex. Occ. Code Ann. § 1704.109(b) and 42 U.S.C. § 1988(b), are reproduced in the Appendix.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343(a)(3) and (4). Respondents Carl R. Pruett and Scott Martin sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201. They alleged that a then newly amended Texas statute, Tex. Occ. Code Ann. § 1704.109 (Vernon 2003) unconstitutionally restricts their free speech rights. The statute places time restrictions upon bail bondsmen making unsolicited contact with potential customers to solicit bonding business. Respondents are bail bondsmen whose business practices conflict with the statute. The district court concluded and held that "the statute is unconstitutional". *Pruett v. Harris County Bail Bond Board*, 400 F. Supp.2d 967, 980 (S.D. Tex. 2005). The court enjoined the Bail Bond Board and Harris County from enforcing the statute and awarded the Respondents attorney's fees in the amount of $50,000 plus an additional $25,000 in the event of an appeal.

The court noted in its order awarding attorney's fees that: "(a) Harris County is not involved in the regulation of bail bondsmen; (b) the Harris County Bail Bond Board is not a policy-making body; it merely enforces the laws and policies of the state of Texas; and (c) neither Harris County nor the Bail Bond Board enforced the statute against the plaintiffs". ROA 4632.

On appeal the United States Court of Appeals for the Fifth Circuit affirmed in part and reversed in part the district court's decision on the merits. The court concluded that Subsection (b)(2)(A) of the statute, which prohibits in-person and telephone solicitation at late hours, survives *Central Hudson* scrutiny. *Pruett v. Harris County Bail Bond Board*, 499 F.3d 403, 415-416 (5th Cir. 2007). The remainder of subsection (b) was considered unconstitutional. The court concluded that subsection (b)(1), which prohibits solicitation of bonding business related to an individual with an outstanding arrest warrant, is not narrowly tailored. *Id.* at 413-414. The court further concluded that the Petitioners had not shown that the 24-hour ban contained in subsection (b)(2)(B) directly serves the state's interest in privacy. *Id.* at 414-415. The Court of Appeals vacated and remanded the district court's award of fees for further consideration. The Respondents had requested attorney's fees of almost $200,000. Petitioners argued that "special circumstances" should preclude awarding any attorney's fees. When addressing the question of "special

circumstances" the Court of Appeals said the following:

> "That a defendant does not promulgate a policy does not eliminate the costs the plaintiff had to bear in securing his rights, hence even defendants lacking culpability and acting in good faith should pay attorney's fees."

Id. at 417. The court therefore concluded that the Petitioners had "failed to make an extremely strong showing of special circumstances." *Id.*

REASONS FOR GRANTING THE WRIT

The Texas statute invalidated in part by the Court of Appeals in this case, Section 1704.109(b) of the Texas Occupations Code, does not offend constitutional protections as it merely places reasonable, temporal restrictions on commercial speech. Commercial speech – that is, speech that relates to a commercial transaction or the economic interests of the speaker – is accorded limited constitutional protection and is subject to regulation that would be impermissible in the context of noncommercial speech. In that regard, there is no requirement that the law enacted must be the "least restrictive alternative", as required in restrictions of noncommercial speech. Rather, the perceived problem and the governmental solution must have a relationship that can be described as a "reasonable fit". Of course, the problem

must be real and the solution must be a reasonable restriction of speech.

The purpose of Section 1704.109(b)(1) is the protection of law enforcement officers and the public from physical harm during the process of arresting an offender. Section 1704.109(b)(1) does not curtail speech, but merely postpones it until after the accused has been arrested. The Fifth Circuit's determination that this restriction is unconstitutional is a misapplication of this Court's precedents regarding commercial speech and time, place and manner regulations.

The statute is substantially similar in content to the Harris County Bail Bond Board's Local Rules 24 and 25. Such rules were held to be constitutional in *Harris County Bail Bond Board v. Pruett*, 177 S.W.3d 260 (Tex. App. – Houston [1st Dist.] 2005, pet. granted), save and except for the 24-hour provision contained in Local Rule 25. All of the parties in that case filed petitions for review in the Supreme Court of Texas. The petitions were granted and the case remains pending before that court at this time.

I. The Restrictions Upon Commercial Speech Which Are Imposed By Section 1704.109(b)(1) Do Not Offend Constitutional Protections.

In *Florida Bar v. Went for It, Inc.* this Court considered the validity of attorney disciplinary rules that created "a brief 30-day blackout period after an accident during which lawyers may not, directly or

indirectly, single out accident victims or their relatives in order to solicit their business". 515 U.S. 618, 620-621 (1995). The Court found this form of advertising to be "commercial speech" that, although "accorded a measure of First Amendment protection", is "subject to modes of regulation that might be impermissible in the realm of noncommercial expression". *Id.* at 623 (internal quotations and citations omitted). For example, "the government may freely regulate commercial speech that concerns unlawful activity or is misleading". *Id.* at 623-624. Commercial speech falling outside these categories

> may be regulated if the government satisfies a test consisting of three related prongs: First, the government must assert a substantial interest in support of its regulations; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be narrowly drawn.

Id., citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) (internal quotations omitted).

When applying the *Central Hudson* test in this case the Court of Appeals agreed with the district court that the governmental interests asserted by the Petitioners in support of the statute's constitutionality are substantial. Those interests included diminishing (1) the flight risk for felony offenders and high-level misdemeanor offenders; (2) the risk of harm to

arresting officers, defendants, and bystanders when such defendants are arrested; (3) the risk of harm to victims, family members, or witnesses from retribution; and (4) the potential for the destruction of evidence. 499 F.3d at 411. The Court of Appeals further accepted that subsection (b)(1) directly advances the state's interests. 499 F.3d at 412. However, the Court of Appeals concluded that subsection (b)(1) is not narrowly tailored because it prohibits solicitation of targets "days, weeks, or even months after warrants are issued". 499 F.3d at 413. Further, the court held that the breadth of crimes covered by subsection (b)(1), combined with the statute's temporal breadth, is "simply too broad". 499 F.3d at 414.

Although the Court of Appeals correctly noted that the statute is a restriction that involves "methods, times, and subjects of solicitation and does not have as a goal the suppression of speech", the court failed to apply this Court's precedents established in time, place, and manner cases. 499 F.3d at 409 n.5, 412-414. As this Court said in *Ward v. Rock Against Racism*, 491 U.S. 781, 798-799 (1989), regulation of protected speech in such cases need not be the least restrictive or least intrusive means for serving the government's legitimate, content neutral interest. "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation'." *Id.* As long as the means chosen are not substantially broader than necessary to achieve the government's interest the

regulation will not be invalid "simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative". *Id.* at 799.

In the instant case the Court of Appeals concluded that the Texas Legislature could alter the statute to include a "time limit on solicitation, with a window prior to solicitation that would give police officers time to act". However, the problem with that less restrictive alternative is its potential to defeat the government's legitimate interest in protecting officers from harm in cases in which a fugitive is difficult to find. Although most arrest warrants can be executed within a few days after issuance, others may take longer. If the person to be arrested is tipped off about the impending arrest as a result of a bail bondsman's solicitation call, the risk to the arresting officer remains the same whether a long or short period of time has elapsed since the issuance of the warrant. Thus, a given "window prior to solicitation" may prove to be inadequate. If a suggested alternative is not "adequate" to achieve the government's interest, it cannot supplant the means chosen by the government. Compare *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 218 (1997) ("In any event, after careful examination of each of the alternatives suggested by appellants, we cannot conclude that any of them is an adequate alternative to must-carry for promoting the Government's legitimate interests.").

To require as a condition for constitutionality of the statute an arbitrary cutoff of the statute's protection, say four or five days after issuance of the warrant, would involve the courts in determining the degree to which the government's interest in officer safety should be promoted. In the instant case the alternative hypothesized by the Court of Appeals reflects nothing more than a disagreement with the Texas Legislature over how much protection is appropriate. Compare *Ward*, 491 U.S. at 800 ("The alternative regulatory methods hypothesized by the Court of Appeals reflect nothing more than a disagreement with the city over how much control of volume is appropriate or how that level of control is to be achieved."). Like the Court of Appeals in *Ward,* the Court of Appeals in the instant case erred in failing to defer to the Legislature's reasonable determination that its interest in protecting officers and the public would be best served by prohibiting solicitation of bonding business related to an individual with an outstanding arrest warrant until after the arrest is made. In that regard the Court of Appeals stated that "it is relevant that other, less-restrictive and more-tailored means exist". 499 F.3d at 412. This statement coupled with the court's citation of *Riley v. Nat'l Federation of the Blind of N.C., Inc.*, 487 U.S. 781 (1988), a case which involved a content-based regulation and fully protected speech (charitable solicitation), rather than a time, place and manner regulation and purely commercial speech, demonstrates that the court was not applying this Court's

time, place and manner/commercial speech precedents when it concluded that the statute in question is not sufficiently tailored to pass constitutional muster. 499 F.3d at 413 n.23.

Although the Court of Appeals said that it did not cast as unreasonable the Legislature's choice to exclude from the coverage of the statute only Class C misdemeanors, it considered the breadth of crimes covered by subsection (b)(1) to be simply too broad. 499 F.3d at 414. The Court concluded that subsection (b)(1) "could reasonably allow solicitation of certain Class A and B misdemeanor targets, those not liable to run". *Id.* The difficulty with that alternative, in part, is its implementation through legislative enactment. The Court of Appeals' suggestion defies any legislative body's ability to draft adequately worded legislation. Similarly, the district court suggested that a "screening mechanism" could be utilized by bail bondsmen to allow solicitation in all cases except certain categories of "risky arrest warrants". 400 F.Supp.2d at 979. One can only wonder how the Legislature is to succinctly describe in the statute, much less identify, the misdemeanor targets who are not "liable to run" or how the Legislature is to determine, with any degree of accuracy, which Class A and B misdemeanor offenses will not involve "risky arrest warrants". To paraphrase this Court's language in *Went for It,* 515 U.S. at 633, it is hard to imagine the contours of a statute that might satisfy the lower courts on this score. Even persons charged with Class B misdemeanors may well face incarceration of up to

180 days and not less than 30 days in jail if they are repeat offenders. Tex. Penal Code § 12.43(b). Enhanced punishment of repeat offenders is applicable even if the crime charged does not involve any form of violence. *Id.*

Regardless of the nature of the crime charged, it is not reasonable to expect any bondsman to know whether an individual may face lengthy incarceration, and, therefore, choose to flee or violently resist arrest when tipped off that an arrest warrant has been issued. Further, the fact that the Harris County Sheriff's Department sends notice letters regarding outstanding warrants to certain nonviolent offenders has no bearing on the issue. Section 1704.109 is a statute with statewide applicability. As a practical matter the state legislature simply cannot be expected to craft a statute restricting solicitation of business by bail bondsmen that is more narrowly tailored than Section 1704.109 already is. Although screening targets for those who could be notified or expanding the exclusion in subsection (c) to include certain categories of Class A and B misdemeanor defendants might be marginally less intrusive, such alternatives are not workable alternatives in practice. There are simply too many variables and too much important, but usually unknown, information for these alternatives to be feasible. In any event, Petitioners submit that placing an officer's safety in the hands of bondsmen, whose primary concern is to maximize bond sales, is not a reasonable alternative. Consequently, subsection (b)(1) is not "substantially

broader than necessary" to achieve the Legislature's legitimate ends and thus it "satisfies the requirement of narrow tailoring". *Ward*, 491 U.S. at 802.

The final requirement for a time, place and manner regulation to have constitutional validity is that it leave open ample alternative channels of communication. *Id.* Although subsection (b)(1) temporarily restricts all forms of solicitation related to a specific individual with an outstanding arrest warrant unless the bail bondsman has an existing bail bond on the individual, the statute still leaves open the option to advertise generally regarding the available services of the bail bondsman. Compare *Went for It*, 515 U.S. at 633-634 (describing advertising on television and radio, on billboards, in newspapers and the Yellow Pages of telephone directories as "ample alternative channels" for receipt of information about the availability of legal representation during the 30-day blackout period after an accident).

While advertising does not allow the bondsman to target a specific individual, the Constitution does not require that persons involved in the judicial process have an unlimited right to speak about anything they wish at any time. For example, this Court has held that a lawyer could be disciplined for making statements to the press about a pending case in which he represented a criminal defendant. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). The rule in question in *Gentile* was designed to protect the integrity and fairness of the state's judicial system. It imposed only narrow and necessary

limitations on lawyers' speech. The rule merely postponed the attorneys' comments until after the trial. Similarly, subsection (b)(1) simply postpones, in the interest of officer safety, a bondsman's solicitation regarding a specific individual until after the arrest warrant is executed. Clearly, the safety of arresting officers is a matter of paramount public interest and of far more importance than the need of a bondsman to employ a particular business practice for profit – even one having a measure of constitutional protection. Therefore, Petitioners submit that subsection (b)(1) of the statute is constitutional.

II. In Actions Seeking Prospective Relief, Lack Of Responsibility For An Alleged Constitutional Violation Should Be Considered A Factor Which A Court, In Its Discretion, May Deem To Be A Circumstance Which Would Render An Award Of Attorney's Fees Unjust.

This case presents an opportunity for the Court to provide guidance regarding the circumstances which would render an award of attorney's fees unjust in cases involving fee-shifting statutes. The Court first employed the phrase "unless special circumstances would render such an award unjust" in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), an action brought under Title II of the Civil Rights Act of 1964. Although the Court said that there were no such circumstances present in that case, the Court did not explain or give examples of

what might constitute such special circumstances. After the Court decided *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), in which the Court held that only Congress, and not the courts, could authorize an exception to the "American Rule", Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559. The Act was intended to allow a court, in its discretion, to award attorney's fees to a prevailing party in suits brought to enforce certain civil rights statutes, including 42 U.S.C. § 1983. Although the text of 42 U.S.C. § 1988(b) does not specifically provide for the "special circumstances" exception recognized by the Court in *Newman*, the legislative history of the statute reflects that Congress intended such an exception to apply. See S. Rep. No. 94-1011, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 ("It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'").

It is now firmly established that Section 1988(b) is to be interpreted as having a special circumstances exception. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). However, as noted in *Deja Vu v. Metropolitan Government*, 421 F.3d 417, 422 (6th Cir. 2005), "little guidance has been provided" by this Court "as to precisely what constitutes a special circumstance that would defeat a fee award". As a result, various

circuits employ different standards when evaluating whether special circumstances are present in a case. The Sixth Circuit has "opted for a case-by-case approach rather than adopting a 'predetermined formula' ". *Id.* The First Circuit considers factors such as whether there is a showing of "outrageous" or "inexcusable" conduct by the plaintiff or his counsel during the litigation of the case. *Williams v. Hanover Housing Authority*, 113 F.3d 1294, 1301 (1st Cir. 1997). Further, the First Circuit focuses "not on the defendants' conduct, but on the harm suffered by the plaintiffs and the relief obtained through their lawsuit". *Id.* at 1302. The Second Circuit employs a "two-step test for courts to apply when considering whether special circumstances make it appropriate to deny attorneys' fees". *Raishevich v. Foster*, 247 F.3d 337, 344-345 (2d Cir. 2001). First, a court in that circuit must make an initial determination whether the plaintiff's claim was so strong on the merits and so likely to result in a substantial judgment that counsel in similar cases could be easily and readily retained. If that requirement is satisfied, a court may then consider such factors as the award of punitive damages, the amount of the compensatory award, the degree and measurability of the harm to the plaintiff and the public interest in the particular claim. *Id.* In the Ninth Circuit the courts consider (1) whether awarding fees would further the congressional purpose in enacting the remedial statute and (2) the balance of the equities. *Abu-Sahyun v. Palo Alto Unified School Dist.*, 843 F.2d 1250, 1253 (9th Cir. 1988). The Fifth Circuit requires "*an extremely strong*

showing of special circumstances" to justify a denial of fees. *Houston Chronicle Publishing Co. v. City of League City*, 488 F.3d 613, 623 (5th Cir. 2007). However, Fifth Circuit case law tends to focus on what are not "special circumstances", rather than what would be such circumstances. See *Kirchberg v. Feenstra*, 708 F.2d 991, 998-999 (5th Cir. 1983).

In the instant case the Fifth Circuit concluded that the Petitioners "failed to make an extremely strong showing of special circumstances". *Pruett*, 499 F.3d at 417. In support of that conclusion the Court of Appeals said that not promulgating a policy "does not eliminate the cost the plaintiff had to bear in securing his rights, hence even defendants lacking culpability and acting in good faith should pay attorney's fees". *Id*. This suggests that the court equated the Petitioners' special circumstances argument with arguments made by defendants who asserted that they acted in good faith. See the court's footnote 46. However, what the district court found, in effect, was that the Petitioners had not acted at all. See Order on attorney's fees, App. 54 ("neither Harris County nor the Bail Bond Board enforced the statute against the plaintiffs"). Petitioners submit that the instant case is therefore fundamentally different from cases in which the defendant, while acting in good faith, actually violated a constitutional right.

The Harris County Bail Bond Board was made a defendant in this suit, because it is charged with the duty to enforce the provisions of Chapter 1704 of the Texas Occupations Code in Harris County. Tex. Occ.

Code Ann. § 1704.102(a). The Board is an entity created by Tex. Occ. Code Ann. § 1704.051. By statute the Board is comprised of certain specified county officials and judges, a state district judge, a licensed bail bond surety and a criminal defense attorney practicing in the county. Tex. Occ. Code Ann. § 1704.053. Harris County is simply a political subdivision of the state of Texas and has no enforcement authority with respect to the provisions of Chapter 1704.

The passage of the amendment of Section 1704.109 by the Texas Legislature in 2003, and the mere presence of the Board, did not "chill" the solicitation activities of the Respondents. It was undisputed that the Respondents continued unabated in soliciting business in open and notorious violation of the provisions of Section 1704.109 throughout the entire course of this litigation. Although the Board is vested with enforcement authority over bondsmen, the Board did not participate in the creation of Section 1704.109 and no action was taken by the Board to punish the Respondents for violating the statute. It would be wholly inequitable to award attorney's fees against a party who was not responsible for creating a state law, who did nothing to enforce the state law, and who was sued simply because of its status as the local enforcement authority under that state law. Harris County, of course, did not even have enforcement authority.

The only instances in which this Court has commented on a similar circumstance is in dicta in

Supreme Court of Virginia v. Consumers Union of United States, Inc., 446 U.S. 719 (1980) and in a footnote in *Kentucky v. Graham*, 473 U.S. 159, 164-165 n.8 (1985). In *Consumers Union* the Court said that it was "not convinced that it would be unfair" to award fees against a State Bar, which by statute was designated as an administrative agency to help enforce the State Bar Code. *Id.* at 739. This suggested that mere enforcement authority alone might support an award of attorney's fees under Section 1988(b). However, Chief Justice Burger's dissent from the denial of certiorari on the third occasion when the case came before this Court seemed to suggest that was not the Court's intent. In that opinion the Chief Justice said: "If we had thought that the mere existence of enforcement authority would support the award, there would have been no need to remand as to the Virginia Court. Thus, we necessarily remanded for further findings on the Virginia Court's actual exercise of its enforcement powers, and for consideration of whether such acts justified a fee award against the court". *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 462 U.S. 1137, 1143 (1983) (Burger, C.J., joined by Rehnquist, J., dissenting). Then, in *Graham*, the Court said it had "suggested" in *Consumers Union* "that fees could be recovered" from the court and its chief justice "in their enforcement roles", without specifically commenting as to whether enforcement authority alone would support a fee award. *Graham*, 473 U.S. at 164-165 n.8.

While it is undoubtedly true that in most instances prevailing plaintiffs are entitled to recover attorney's fees from defendants, Congress and this Court recognize an exception if awarding fees would be "unjust". Unjust in that context must necessarily refer to an award being unjust to the defendant. Obviously, it would never be unjust to the plaintiff. If the exception for special circumstances is to have any real meaning, the fact that a suit was brought against a local enforcement authority because of its status as such should be considered a factor which a court, in its discretion, may deem to be a circumstance which would render an award of attorney's fees unjust. In any other context than an action involving a First Amendment claim, the plaintiff's standing to sue would not even be recognized. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court'."). Therefore, Petitioners submit that when a court is exercising the discretion to award attorney's fees, focusing solely on the need to compensate private attorneys general without consideration of the defendant's actual conduct is manifestly unjust. So it is here.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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499 F.3d 403

United States Court of Appeals, Fifth Circuit.

Carl R. PRUETT; Scott Martin,
Plaintiffs-Appellees-Cross-Appellants,

v.

HARRIS COUNTY BAIL BOND BOARD; Harris County, Defendants-Appellants-Cross-Appellees.

No. 05-20714.

Aug. 28, 2007.

David Allen Furlow (argued), Thompson & Knight, Stacy Lynn Kelly, MacIntyre & McCulloch, Houston, TX, for Pruett and Martin.

Bruce S. Powers, Asst. Cty. Atty. (argued), George Andrew Nachtigall, Houston, TX, for Harris Cty. Bail Bond Bd. and Harris Cty.

Appeal from the United States District Court for the Southern District of Texas.

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, WIENER, and CLEMENT, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

In response to the Petition for Rehearing filed by the defendants, we withdraw the prior panel opinion in its entirety and substitute the following.

Two bail bondsmen challenged a Texas statute restricting solicitation of potential customers as a denial of their First Amendment rights. The district

court agreed. Concluding that all but one of the restrictions violates the bondsmen's right to commercial speech, we affirm, reverse, and remand, all in part.

I

Bail bondsmen Carl Pruett and Scott Martin filed this § 1983 action against Harris County and the Harris County Bail Bond Board,[1] challenging on various federal and state constitutional grounds, including the First Amendment, a Texas statute governing solicitation of customers, TEX. OCC. § 1704.109 (2003). That statute provides:

> (a) A board by rule may regulate solicitations or advertisements by or on behalf of bail bond sureties to protect:
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> (1) the public from:
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> (A) harassment;
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> (B) fraud;
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> (C) misrepresentation; or
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> (D) threats to public safety; or
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> (2) the safety of law enforcement officers.

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[1] The Board, a creature of Texas statute, is responsible for supervising and regulating the bond business and enforcing bond rules and statutes. TEX. OCC. § 1704.101, .102 (2005). The State of Texas declined to intervene, hence Harris County and the Board ("Harris County") defend the statute.

(b) A bail bond surety, an agent of a corporate surety or an employee of the surety or agent may not make, cause to be made, or benefit from unsolicited contact:

(1) through any means, including in person, by telephone, by electronic methods, or in writing, to solicit bonding business related to an individual with an outstanding arrest warrant that has not been executed, unless the bail bond surety or agent for a corporate surety has an existing bail bond on the individual; or

(2) in person or by telephone to solicit bonding business:

(A) that occurs between the hours of 9 p.m. and 9 a.m.; or

(B) within 24 hours after:

(i) the execution of an arrest warrant on the individual; or

(ii) an arrest without a warrant on the individual.

(c) This section does not apply to a solicitation or unsolicited contact related to a Class C misdemeanor.

The plaintiffs challenge subsection (b), which contains two prohibitions. Subsection (b)(1) prohibits any solicitation regarding an outstanding warrant, unless the subject of the warrant is a previous customer. Subsection (b)(2) restricts the time of solicitation after arrest, prohibiting solicitation in person or

by phone from 9:00 p.m. to 9:00 a.m., or within 24 hours after a person has been arrested, either with or without a warrant. The statute does not prevent attorneys, law enforcement officials, or anyone else from alerting someone that he's the subject of an open warrant. Law enforcement officials frequently send letters to petty defendants giving notice of open warrants against them, hoping they'll turn themselves in.

Bondsmen use several methods to solicit business. One particularly useful tool is the Harris County Justice Information Management System (JIMS), a computer system accessible to the public through terminals and the Internet which provides, *inter alia,* names and addresses of persons arrested and subjects of arrest warrants. Given the public's ease of access to JIMS, Harris County waits 48 hours after an arrest warrant is issued to post the information about the warrant on JIMS, allowing law enforcement officers to execute the warrant first.

The district court granted the bondsmen's motion for summary judgment, holding the statute unconstitutional and enjoining its enforcement. It granted in part the plaintiffs' motion for fees, awarding them $50,000 plus $25,000 in the event of appeal. Harris County appeals the judgment, including the award of fees, and plaintiffs cross-appeal the award of fees, asking for more.[2]

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[2] In early 2001, Harris County adopted by local rule solicitation restrictions similar to those of current § 109(b). Later that

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II

The metaphor of political speech finding its place in the marketplace of ideas proved to be a powerful if inexact force, drawing speech in its myriad presentations under the umbrella of First Amendment protection – the force of the metaphor itself a validating testament to the power of an idea so strong as to invite confusion of metaphorical imagery with defining principle. And in 1975, with the Supreme Court's decision in *Bigelow v. Virginia,*[3] speech in the marketplace of actual goods itself gained protection, albeit as "less valuable speech," termed "commercial speech." It signifies that commercial speech did not displace otherwise protected speech in gaining First

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year, the Texas legislature enacted the original version of § 109, which allowed local boards to regulate solicitation. In 2002, plaintiff Pruett challenged the local rules in state court. The trial court held the rules unconstitutional, *see Harris County Bail Bond Board v. Pruett,* No. 01-02-01043-CV, 2004 WL 2307362 (Tex.App. – Houston [1 Dist.] Oct. 14, 2004, no pet. h.), the appellate court partially reversed, 177 S.W.3d 260 (Tex.App.2005), and the case is pending before the Supreme Court of Texas. The present case involves current § 109(b), which was enacted in 2003 but concerns issues similar to those in the state court case. However, the present case involves a central issue of federal constitutional law, and although we abstain from ruling on issues of Texas constitutional law, *see Railroad Com. v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), we rarely abstain from ruling on federal constitutional law, *see Pennzoil v. Texaco, Inc.,* 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987); *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), and do not do so here.

[3] 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975).

Amendment protection. That a book or article is sold or a column is written for compensation does not eliminate its protection.[4] In sum, commercial speech, with its lesser protection, is at bottom advertising. As the parties and the court below recognized, § 1704.109 is a restriction on commercial speech.

Restrictions on commercial speech are analyzed under the framework of *Central Hudson*.[5] The

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[4] *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-62, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

[5] *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Com. of New York*, 447 U.S. 557, 563-64, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). The parties quarrel about what level of scrutiny *Central Hudson* mandates. Citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), the plaintiffs urge something "akin to strict scrutiny." *44 Liquormart*, however, was a plurality opinion involving "a blanket prohibition against truthful, nonmisleading speech about a lawful product," *id.* at 504, 116 S.Ct. 1495, and there's no blanket prohibition here. In any event, the Supreme Court has called *Central Hudson* a form of "intermediate" scrutiny. *See Edenfield v. Fane*, 507 U.S. 761, 767, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993); *see also Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995); *cf. Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 374, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002) (describing the test as "significantly stricter" than rational basis). The precise label for the level of scrutiny embodied in *Central Hudson* is irrelevant, however – we just apply the test. Likewise, the plaintiffs' assertion that the *Central Hudson* test isn't the same as the time, place, and manner test, while true, *see Speaks v. Kruse*, 445 F.3d 396, 400 n. 10 (5th Cir.2006), is axiomatic.

The plaintiffs also suggest that strict scrutiny should apply because the restrictions here are content-based. This argument

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government may ban misleading commercial speech and commercial speech related to illegal activity. "If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed."[6] First, "[t]he State must assert a substantial interest to be achieved by restrictions on commercial speech."[7] Second, "the restriction must directly advance the state interest involved."[8] Third, "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."[9] We review the lower court's application of this test *de novo*.[10]

Before we apply *Central Hudson* to the two restrictions at issue, we address a fundamental dispute coloring much of the parties' arguments and the lower court's ruling. The plaintiffs argue that only evidence created before enactment of § 1704.109 and relied upon or cited by the legislature in passing it

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has no merit – § 1704.109 is a classic restriction on a category of commercial speech, a restriction that involves methods, times, and subjects of solicitation and does not have as a goal the suppression of speech. *See, e.g., Speaks,* 445 F.3d at 400 (examining similar restriction on chiropractor solicitation as a restriction on commercial speech).

[6] *Central Hudson,* 447 U.S. at 564, 100 S.Ct. 2343.

[7] *Id.*

[8] *Id.*

[9] *Id.* Despite the language of the third prong, the Supreme Court and, thus, this court do not require that the state use the least-restrictive means. *See, e.g., Speaks,* 445 F.3d at 401 n. 14.

[10] *See Speaks,* 445 F.3d at 399.

can be considered under *Central Hudson*. Consequently, they argue, because the legislative record behind § 1704.109 is bare, it cannot survive scrutiny. Harris County disagrees, offering testimony and affidavits introduced in the court below and arguing that *Moore v. Morales*[11] relied upon testimony at trial in ascertaining the justification for a statute. The district court agreed with the plaintiffs, although it held that § 1704.109 failed scrutiny even considering Harris County's additional evidence.

Central Hudson does not require that evidence used to satisfy its strictures exist pre-enactment. Plaintiffs rely heavily on the statements in *Edenfield v. Fane* that a statute cannot be justified "by mere speculation or conjecture" and that "the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions."[12] Those statements, however, only distinguish between rational basis review, under which a court can, and should if necessary, confect its

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[11] 63 F.3d 358, 362-63 (5th Cir.1995). Harris County also relies on *BGHA, LLC v. City of Universal City, Texas*, 340 F.3d 295, 299 (5th Cir.2003) (discussing *J&B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 371 (5th Cir.1998), which allowed the city to justify an ordinance based on evidence adduced at trial).

[12] 507 U.S. 761, 768, 770, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993); *see also Went for It*, 515 U.S. at 624, 115 S.Ct. 2371 (quoting *Edenfield*). The plaintiffs cite to other cases, like *U.S. West, Inc. v. F.C.C.*, 182 F.3d 1224 (10th Cir.1999), which simply restate this rule.

own reasons to justify a statute, and *Central Hudson* review, under which a court can consider only the reasons proffered by the state. While with commercial speech the state need not demonstrate that its regulatory means were the least intrusive on protected speech,[13] it must at least articulate regulatory objectives to be served. But that doesn't mean the state can proffer only reasons locatable in the legislative record. Indeed, in *Moore,* our most relevant case, the court's language shows that it considered post-enactment evidence in analyzing a *Central Hudson* claim.[14] Even with a First Amendment doctrine calling for "intermediate scrutiny" such as regulation of sexually-oriented businesses, where the argument to disallow post-enactment evidence as justification for a statute has some logical purpose, we have specifically rejected the plaintiffs' contention that evidence of purpose must be drawn only from a contemporaneously generated legislative record. And there the threshold question is whether the legislative body is regulating protected activity or its

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[13] *See supra* note 6.

[14] 63 F.3d 358, 362-63 (5th Cir.1995) (stating "[b]efore us is extensive evidence" and, twice, "[t]hey testified"). In their brief, plaintiffs suggest that this "evidence" and "testimony" was actually pre-enactment "evidence" and "testimony," presumably created in connection with the legislation itself. The district court's ruling, however, makes clear that the evidence was developed at trial. *See Moore v. Morales,* 843 F.Supp. 1124 (S.D.Tex.1994).

effects.[15] We consider the testimony and affidavits introduced by Harris County in the court below, as the district court did in the alternative.

A

We turn first to subsection (b)(1), which prevents solicitation regarding outstanding warrants unless the bondsman has a prior relationship with the party. Harris County concedes that the solicitations at issue are neither deceptive nor relate to illegal activity. Next, under the first prong of *Central Hudson,* Harris County asserts as substantial interests the diminishment of: 1) the flight risk for felony offenders and high-level misdemeanor offenders; 2) the risk of harm to officers, defendants, and bystanders when such defendants are arrested; 3) the risk of harm to victims, family members, or witnesses from retribution;

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[15] *See Illusions-Dallas Private Club, Inc. v. Steen,* 482 F.3d 299 (5th Cir.2007) (rejecting argument that legislative record or statutory preamble was necessary to discern a content-neutral purpose for statute); *J&B Entm't, Inc. v. City of Jackson,* 152 F.3d 362, 371 (5th Cir.1998) (allowing use of evidence of secondary effects developed pre-enactment or adduced at trial). Plaintiffs cite other cases that seem to disagree, *see Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County,* 337 F.3d 1251, 1265-67 (11th Cir.2003); *Hickerson v. City of New York,* 146 F.3d 99, 105 (2d Cir.1998); *11126 Baltimore Blvd. v. Prince George's County,* 886 F.2d 1415, 1423 (4th Cir.1989), *judgment vacated by*496 U.S. 901, 110 S.Ct. 2580, 110 L.Ed.2d 261 (1990); *SOB, Inc. v. County of Benton,* 317 F.3d 856, 862 (8th Cir.2003); *D.H.L. Associates v. O'Gorman,* 199 F.3d 50, 57-58 (1st Cir.1999), but those cases aren't controlling, of course.

and 4) the potential for destruction of evidence, interests alluded to in the statute itself.[16] The district court found that these interests were substantial. We agree, although to the extent that Harris County itself notifies non-serious offenders of open warrants against them – and the evidence shows that Harris County does this regularly[17] – the interests are not substantial at all. Deferring that concern to the third prong, where it more easily fits, and assuming the interests are substantial in the abstract, we turn to the second prong.

Under the second prong, Harris County must show that (b)(1) directly advances these interests. Witnesses for Harris County testified that executing arrest warrants is dangerous, that maintaining the "element of surprise" is important in decreasing the target's ability to flee, resist, harm people, or destroy

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[16] The plaintiffs argue that the legislature's purpose in enacting § 109 was to hinder competition between large, affiliated bondsmen and independent bondsmen, but their evidence largely relies upon claims that the legislature responded to strong anti-competitive lobbying by Pruett's and Martin's competitors, International Fidelity Insurance Company. In any event, even if the impulses behind § 109 were anti-competitive, § 109 could still be supported by other, legitimate interests.

[17] *See, e.g.*, Affidavit of Sergeant Larry Hall. (Hall, employed by the Harris County Sheriff's office since 1976, described the County's notification policy, which allows the County to "wean out possibly dangerous misdemeanants and send notification letters only to non-threatening, non-serious misdemeanants who are likely to save Harris County money and serve public policy by voluntarily coming in and making appropriate arrangements. . . .")

evidence, and that bondsman solicitation has, in certain past anecdotal incidents, tipped off criminals and caused problems.[18] Although other Harris County witnesses testified that they knew of no instances where bondsman solicitation had caused a problem, and the bondsmen's main expert witness testified similarly, we accept as true the testimony supporting the County, given the procedural posture of this case. We note, however, that the record does not indicate the date of many of the incidents described and fails to reflect, in several instances, which incidents occurred before institution of the 48-hour JIMS window. At least one anecdote, however, references an individual suspected of manufacturing methamphetamine who had received a tip that he would be arrested and opened fire on police officers when they arrived to arrest him in 1988.[19] Presumably such a

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[18] *See, e.g.*, Oral Deposition of Alvin W. Berry ("The element of surprise . . . does not give the defendant or the person to be arrested the ability to either flee or to resist."); Affidavit of James Fitzgerald (describing how a murder suspect fled after receiving solicitation from a bondsman and was missing for about six days before being apprehended); Affidavit of Rodney Marcotte ("[A]fter apprehending suspects, they have indicated to me that they fled immediately after receiving notice of solicitation by one or more bondsmen."); Affidavit of Sergeant Kent Radney (describing how a suspect, aware that he would be arrested, greeted police officers with open fire).

[19] Cross-Examination of Bruce Douglas Carr, discussing how the incident discussed in Sergeant Radney's affidavit occurred in 1988, prior to the implementation of JIMS. *See also* Affidavit of Kent Radney (describing the gun battle, which occurred in October 1988).

suspect would be targeted, and hopefully caught, within the 48-hour period preceding posting on JIMS. Nevertheless, we accept at this point that (b)(1) directly advances the state's interests.[20]

However, even assuming that (b)(1) advances the stated interests, (b)(1) fails prong three of *Central Hudson*. While that prong does not require that the state employ the least-restrictive means to accomplish its goals,[21] it does require a good fit between the means and the goals. Consequently, in determining whether "the means are in proportion to the interests they purport to serve,"[22] it is relevant that other,

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[20] The bondsmen also argue that (b)(1) does not directly advance the stated interests because it excludes bondsmen with an "existing business relationship." Essentially, they argue that (b)(1) does not go far enough and should not have this exclusion, as some of their witnesses testified. This argument sounds in underinclusivity, and thus may relate more properly to prong three, but in any event we agree with the court in *Harris County Bail Bond Board v. Pruett*, 177 S.W.3d 260, 273-74 (Tex.App.2005), that this exception is not problematic. First, that court construed "existing business relationship" to mean that "the bondsman involved has in place an existing, current bond on the person requiring another bond." That definition controls here. As the court noted, such a bondsman would want to contact the person because the new warrant might affect his current bond. Moreover, as the court noted, it would be impractical to allow the bondsman to discuss the existing bond but not the possibility of a new bond, and it is unlikely a bondsman would contact someone who he thought would run away because that might lead to forfeiture of the original bond.

[21] *See supra* note 9.

[22] *See Speaks v. Kruse*, 445 F.3d 396, 400 (5th Cir.2006).

less-restrictive and more-tailored means exist. The district court found that Harris County could advance the stated interests by the more narrow means of: 1) increasing the number of officers executing warrants, thereby arresting risky offenders before the 48-hour JIMS window expires; 2) extending the 48-hour window; and 3) screening targets for those who could be notified. The County complains that the first two alternatives are impractical and the third outside the Texas legislature's control. The first may be impractical. But the second is not, in the district court's form or in the form we address – wherein the legislature could alter § 109 to include a time limit on solicitation, with a window prior to solicitation that would give police officers time to act.[23] And here, we note that restrictions on commercial speech without any time limitation are inherently suspect.[24] Furthermore,

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[23] After all, whether Harris County could extend the 48-hour JIMS blackout period is irrelevant. The question is whether § 109 is constitutional as written; indeed, other counties may not have a JIMS-type system at all. We, and the Supreme Court, often assume in analyzing whether statutes pass constitutional muster that the legislature could enact a more narrowly tailored means. *See, e.g., Riley v. Nat'l Federation of the Blind of N.C., Inc.*, 487 U.S. 781, 800, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) ("In contrast to the prophylactic, imprecise, and unduly burdensome rule the State has adopted to reduce its alleged donor misperception, more benign and narrowly tailored options are available."); *Lindsay v. San Antonio*, 821 F.2d 1103, 1110-11 (5th Cir.1987) ("For purposes of this opinion, we can assume, *arguendo*, that the traffic safety interest could be furthered by means of a more narrowly tailored ordinance.")

[24] *See Speaks v. Kruse*, 445 F.3d 396, 400-01 (5th Cir.2006).

some of the County's own witnesses testified that giving law enforcement 72 or 96 hours or so after arrest to serve a warrant before bondsmen could solicit would greatly serve the County's stated interest.[25] In short, (b)(1) is not narrowly tailored because it prohibits solicitation of targets days, weeks, or even months after warrants are issued.

Furthermore, we agree with the district court that it is telling that Harris County itself, through the Sheriff's Department, notifies thousands of people every year of open warrants against them,[26] as do other law enforcement agencies in the County[27] –

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[25] Of course, the witnesses were asked whether extending the 48-hour JIMS period would help, but exactly why a blackout of a certain length might exist is irrelevant.

[26] In 2002, a Sheriff's Department Sergeant testified that five night-clerks in the Warrants Division send "more than 20" and perhaps as many as 100 of those letters every night, yielding 7,300 to 36,500 a year. We recognize the tension in our holding that what the Texas legislature, not Harris County, can do regarding a time limit is relevant, but also looking to whom Harris County notifies. We look to what Harris County does only to illuminate why it is possible for the statute itself to screen certain targets more finely than the Class C misdemeanor exclusion that it currently contains.

[27] Harris County Constables notify many Class C misdemeanor targets, who are exempted from § 109. The bondsmen introduced evidence from the constables' websites suggesting that they notify certain Class A and B misdemeanor targets as well, and this appears to be true, although the evidence isn't entirely clear. It's undisputed that the Houston Police Department notifies certain targets, although it's unclear what categories of targets, and does not apprise the Sheriff's Department of whom it notifies. In addition, anyone can call the county clerk

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Harris County cannot give such notice itself and then claim that restricting notice by others is necessary to the safety of its officers and the public and the prevention of flight. The County urges that it notifies only people charged with "non-serious" misdemeanors, excluding people accused of assaultive crimes, crimes involving family violence, crimes against the person, or any crime of an aggravated nature. The record reveals that the Sheriff's Department does not notify people in this excluded group of assaultative crimes, or people charged with felonies, wanted for revocation of weekend service or off-work hours, wanted for sentencing, wanted for capias profine that includes jail time, or wanted in another jurisdiction.[28] Yet through that screen still fall many Class A and Class B misdemeanor targets, who escape the Class C misdemeanor exclusion of § 109, including oft-sought targets of bondsmen solicitation like petty thieves, people who write hot checks, drivers on suspended licenses, and certain DWI offenders. Harris County urges that the statute's exclusion of only Class C misdemeanor targets is reasonable because certain

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and ask whether a warrant exists for someone, and various agencies release names and data through posters, press releases, and broadcast media outlets, but these forms of notification seem less relevant because anyone who cares to find out if he has a warrant is not the type of person about whom Harris County professes concern, and because agencies' publicizing information about certain targets occurs, presumably, after they have tried to catch a target and he has become a fugitive.

[28] Also excluded from receiving notification are those with an unknown name, address, or other personal information.

Class A and Class B misdemeanors can result in jail of up to 180 or 360 days, even if they are non-violent, rendering the suspects of such crimes liable to run. That may be true, and we do not cast the legislature's choice to exclude only Class C misdemeanors as unreasonable. However, under the narrow-tailoring test of *Central Hudson* we note that, as Harris County has done, (b)(1) could reasonably allow solicitation of certain Class A and B misdemeanor targets, those not liable to run. Combined with its temporal breadth, the breadth of crimes covered by (b)(1) is simply too broad. We do not hold that Harris County cannot serve its objectives by more narrowly drawn means. Rather, we hold that Harris County has not yet engaged in the narrow tailoring demanded by the First Amendment.

B

We turn next to subsection (b)(2), which prevents solicitation in-person or by phone between 9:00 p.m. and 9:00 a.m. and within 24 hours after arrest. Harris County contends first that (b)(2)(A) regulates conduct that was already unlawful under the general statute prohibiting solicitation between 9:00 p.m. and 9:00 a.m. and before noon on Sundays, TEX. BUS. & COM. CODE § 37.02(a)(2), hence under the threshold inquiry of *Central Hudson*, (b)(2)(B) survives as a ban

on speech relating to illegal activity.[29] This bootstrapping argument fails. The threshold inquiry asks whether the speech is misleading or the product or service spoken about is illegal, and here the speech isn't misleading and the product or service itself – bail bonding – isn't illegal. That § 37.02(a)(2) itself bans speech doesn't save (b)(2)(B). And so we turn to the *Central Hudson* prongs.

Harris County asserts as its substantial interest for (b)(2) the prevention of harassing solicitation, essentially what we have elsewhere called the interest of "privacy," a sufficient interest.[30] But Harris County's argument finds difficulty when its interest is stated more narrowly as the prevention of harassment through bail solicitation and the promotion of privacy of families of persons targeted for arrest. It now differs from solicitation held to be a valid target of legislation.[31] We defer this concern to the next

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[29] In analyzing the second prong on *Central Hudson,* the district court concluded that § 37.02(a)(2) covers only solicitations of a "consumer good or service," and that bail bonding isn't such a good or service. Although we don't pass on the question, we note that § 37.02(a)(2) seems to cover bail bonding, as the Texas Court of Appeals held in Pruett's related case, *see Harris County Bail Bond Board v. Pruett,* 177 S.W.3d 260, 275-76 (Tex.App.2005).

[30] *See Speaks,* 445 F.3d at 400 n. 13.

[31] *See, e.g., id.,* at 400 n. 13, 398-99 (discussing how "[p]rivacy and the protection of citizens against undue influence are valid substantial state interests" but striking down a Louisiana statute preventing direct solicitation of recent accident

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prong, again assuming the interests are substantial in the abstract.

We conclude that the 24-hour window of (b)(2)(B) does not directly advance the state's interest. Harris County offers an affidavit from an employee of the Harris County District Attorney's Office, Kathleen Braddock, stating that the 24-hour period after arrest is the time during which harassing bond solicitations are the worst and that citizen complaints "declined drastically" after Harris County changed its local rules, before the enactment of § 109, to contain essentially what is now § 109. It also offers testimony from four citizens upset at solicitation calls they received. This is insufficient evidence to show that the 24-hour rule directly advances state interests. First, Harris County does not connect the reduction in citizen complaints to the 24-hour rule, as opposed to the other aspects of the amended local rules, particularly the nighttime solicitation ban that we uphold later.[32] Indeed, Braddock's affidavit in the paragraph discussing the 24-hour ban highlights the harassing nature of calls between, especially, midnight and 5 a.m., and three of the four citizens who testified regarding the 24-hour period stated that they received the unwelcome calls between 9 p.m. and

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victims by health care providers as insufficiently narrowly tailored).

[32] Harris County provides no evidence about the nature of the complaints' pre- and post-rule change, preventing any useful conclusion from the reduction in complaints.

9 a.m.[33] We hold later that Harris County can ban such nighttime calls. Second, to whatever extent the testimony of the citizens can be read to cover daytime solicitation, we give credence to the common-sense argument that most families would like to know when their members are in jail.[34] Third, Braddock's conclusory statement that solicitation is the worst in the 24-hour period after arrest is insufficient. Notably, the district court held that Harris County fails to explain why, with the implementation of a 24-hour rule, harassing solicitations won't simply begin on the 25th hour. Harris County now offers an explanation which it urges is implicit in Braddock's statement that most harassing solicitation occurs during the first 24 hours following arrest: most people who can afford bond will seek out a bondsman during the first 24 hours, hence bondsmen will have little incentive to call after that period. Even if true, it is no response to an attack on a restriction on speech that the

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[33] The record does not show when the fourth citizen received the unwelcome call.

[34] Harris County presents evidence to the contrary, where individuals argue that they prefer to receive news about a family member being in jail from another family member. Additionally, Harris County argues that many detained suspects are permitted to make a telephone call to family members. Other evidence, however, such as the testimony of criminal defense attorney Albert Fong, suggests that the many people who are contacted by bondsmen regarding a relative in jail have expressed "gratitude" rather than indignation upon receiving this information. Regardless, this is not the crux of our argument, as we focus on the 24-hour window's effect of stifling an unacceptably large proportion of bondsman speech.

restriction essentially bans all speech. The argument that most bondsmen desire to contact potential customers right away helps explain why solicitation soon after arrest might be prevalent, and therefore harassing, but it also counsels that such a restriction, which prevents speech when it is the most valuable for the speaker and the potential customer,[35] should be viewed with some skepticism. Given the record as a whole, we cannot conclude that Harris County has shown that the 24-hour ban directly serves the interest in privacy.

All that remains is the 9:00 p.m. to 9:00 a.m. restriction. The district court struck that down with the rest of § 109(b), but its rationale for doing so is unclear, although the court seemed to rely partly on its conclusion that the general solicitation timing statute, § 37.02(a)(2), didn't apply to bail bonding. We don't decide that question,[36] although we note that if § 37.02(a)(2) covers bail bonding, then presumably we can't strike down (b)(2)(A) without striking down § 37.02(a)(2), at least "as applied" to bail bonding. We don't face that dilemma because we conclude that (b)(2)(A) survives *Central Hudson* scrutiny. Prohibiting in-person and telephone solicitation at late hours directly and substantially furthers privacy and the prevention of harassing solicitation, and is narrowly

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[35] The benefits attending commercial speech flow not just to the speaker, for increased consumer knowledge about any product aids consumer choice and increases competition.

[36] *See supra* note 26.

tailored to furthering that goal. A nighttime prohibition is inevitably underinclusive because privacy may be lost and harassing solicitation made during the day, but surely the state's interest is more powerful at night. Indeed, we've found no successful challenges to general nighttime solicitation bans.

III

The plaintiffs also attacked § 109 below on vagueness, equal protection, and Texas law grounds. The district court never addressed these arguments after concluding that § 109 violated the First Amendment. The plaintiffs raise the vagueness and equal protection challenges again on appeal. Hence we must address the vagueness and equal protection arguments as they pertain to (b)(2)(A), the subsection of § 109 most resistant to those arguments. First, (b)(2)(A) is not unconstitutionally vague; two specific types of solicitation of a specific service are banned during a specific time.[37] Second, the plaintiffs' equal protection argument relies entirely on the distinction in (b)(1) between bondsmen with existing client relationships and bondsmen without such relationship – a distinction irrelevant to (b)(2)(A).

Consequently, we affirm the district court's grant of summary judgment to plaintiffs, except for that

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[37] *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).

part enjoining the enforcement of (b)(2)(A), which we reverse.

IV

After addressing the merits, the district court ordered the bondsmen to file a request for fees, pursuant to 42 U.S.C. § 1988. The bondsmen requested almost $200,000. The defendants argued that "special circumstances" should preclude or reduce any award,[38] and they also attacked specific line-items submitted by the bondsmen. The court took no issue with the line-items, but it noted its concern with whether any award should issue given that "(a) Harris County is not involved in the regulation of bail bondsmen; (b) the Harris County Bail Bond Board is not a policy making body; it merely enforces the laws and policies of the state of Texas; and (c) neither Harris County nor the Bail Bond Board enforced the statute against the plaintiffs." The court then awarded what it called "nominal" fees, $50,000, with $25,000 more in the event of appeal. In its August 18, 2005 notice of appeal, Harris County appealed both the underlying merits and the award of fees, urging

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[38] *See Houston Chronicle Pub. Co. v. City of League City, Tex.*, 488 F.3d 613, 623 (5th Cir.2007) (explaining the "special circumstances" exception of *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (quoting a Senate Report behind § 1988 that "a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust' ")).

again that "special circumstances" exist precluding any award of fees. After later, unsuccessful attempts to modify that award, the plaintiffs cross-appealed the issue of fees, asking that we award more money or remand with instructions to award more money because the court's three findings quoted above were erroneous.

At the outset, the parties skirmish over whether the bondsmen's cross-appeal was timely.[39] We need not address this issue because Harris County's appeal, including an appeal of fees awarded, was timely, and that appeal focused on the same question – whether and to what extent the district court could consider the fact that defendants were not the promulgator, or arguably the enforcer,[40] of the statute at issue.

We review a district court's determination of special circumstances for abuse of discretion;[41] although this is a highly deferential standard of review, we find here that because plaintiffs fully succeeded in the case below,[42] the court's award of "nominal"

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[39] *Browder v. Director, Dep't of Corrections,* 434 U.S. 257, 264, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978) (holding that a timely notice of appeal is jurisdictional).

[40] The parties dispute whether defendants did, or were about to, enforce § 109 against them.

[41] *Johnson v. Mississippi,* 606 F.2d 635, 637 (5th Cir.1979).

[42] The district court declared § 109 unconstitutional, found that defendants were liable under § 1983 for "depriving plaintiffs of their constitutional rights," and enjoined defendants from

(Continued on following page)

attorneys' fees to plaintiffs based on defendants' lack of participation in policymaking or regulation of bondsmen was an erroneous interpretation of the special circumstances that the Court in *Hensley*[43] indicates could render an award unjust.

We have held that given the strong policy behind § 1988 of awarding fees to prevailing plaintiffs, defendants must make an "extremely strong showing" of special circumstances to avoid paying attorneys' fees[44] and that "the discretion to deny § 1988 fees is . . . extremely narrow."[45] That a defendant does not promulgate a policy does not eliminate the costs the plaintiff had to bear in securing his rights, hence even defendants lacking culpability and acting in

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enforcing the statute. The only point on which the court disagreed with plaintiffs was on their request for damages; it granted an injunction in lieu of damages. The court also declined to address plaintiffs' alternative claims, since it found the statute unconstitutional under their First Amendment claim.

[43] Defendants relied on the *Hensley* case in their response to plaintiffs' motion for attorneys' fees, arguing that "'special circumstances . . . would render . . . an award [of attorney fees and costs] "unjust."'" Defendants Harris County Bail Bond Board's Response to Plaintiffs' Motion to Recover Attorney Fees, Expert Fees and Expenses (citing *Hensley* 461 U.S. at 429, 103 S.Ct. 1933 (1983)).

[44] *See Houston Chronicle Pub. Co. v. City of League City, Tex.*, 488 F.3d 613, 623 (5th Cir.2007).

[45] *Espino v. Besteiro*, 708 F.2d 1002, 1005 (5th Cir.1983) (citing *Ellwest Stereo Theatre, Inc. v. Jackson*, 653 F.2d 954, 955 (5th Cir.1981)).

good faith should pay attorneys' fees.[46] Defendants here failed to make an extremely strong showing of special circumstances. Even if defendants had made an extremely strong showing that rose to the level of special circumstances, this circuit has never held that such "special circumstances" can serve to reduce, and not fully eliminate, an award of fees.[47]

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[46] *See Hopwood v. State of Texas,* 236 F.3d 256, 278 (5th Cir.2000) (noting that § 1988 provides fees under a "private attorney general theory"); *Williams v. Hanover Hous. Auth.,* 113 F.3d 1294, 1301-02 (1st Cir.1997) ("The circuits are in agreement . . . that defendants' good faith reliance even on settled law . . . is not a 'special circumstance' warranting a denial of attorneys' fees under § 1988."); *Lampher v. Zagel,* 755 F.2d 99, 104-05 (7th Cir.1985) (holding that defendants' "good faith" is not sufficient and that local official's enforcement of state law he thought valid was not sufficient); *Martin v. Heckler,* 773 F.2d 1145, 1149-52 (11th Cir.1985) (concluding that state agency which merely enforced federal law and did not write policy failed to present "special circumstances" to justify denial of all fees). In essence, as long as a plaintiff's lawsuit played some role in his eventually obtaining relief – as opposed to, say, a defendant who gratuitously confers relief – he can recover fees. *See Lampher,* 755 F.2d at 104-05.

[47] We find only one case, from the Third Circuit, that has allowed a partial reduction of fees in lieu of all-out elimination of fees under the special circumstances test; the court wrote this opinion directly after the *Hensley* decision, when few other interpretations of that case were available. *See Inmates of Allegheny County Jail v. Pierce,* 716 F.2d 177, 179 (3d Cir.1983) ("[W]e note that *Hensley* was announced after the filing of the district court opinion in the instant case so that the court below did not have the benefit of the Supreme Court's latest teachings.")

The district court would have had more discretion to reduce the County's attorneys' fees in the case below if plaintiffs had partially rather than fully succeeded on their claims,[48] as they have on appeal. Under *Hensley*'s standard for partial success (a different standard than the "special circumstances" that occasionally allow a defendant to avoid attorneys' fees altogether), a court may award reduced fees to plaintiffs that are prevailing parties but have lost on some claims.[49] The court may use its "equitable discretion" to "arrive at a reasonable fee award, either by attempting to identify specific hours that should be eliminated or by simply reducing the award to account for the limited success of the plaintiff."[50] Plaintiffs did not have "partial success" in the district

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[48] *See supra* note 42, discussing plaintiffs' success on all claims with the minor exception of the court's decision to grant an injunction, not damages. Even if the court, in its discretion, had considered this minor exception as a "failure" on a claim, the court did not conduct the correct *Hensley* analysis for partial success but rather (it appears) relied more generally on the special circumstances exception to substantially reduce the award. Additionally, even if the court had conducted a *Hensley* analysis for partial success, plaintiffs would likely have merited a full fee award under the applicable *Hensley* test because plaintiffs soundly won the majority of their claims. *See Hensley*, 461 U.S. at 440, 103 S.Ct. 1933 ("Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised.")

[49] *Hensley*, 461 U.S. at 436, 103 S.Ct. 1933.

[50] *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789-90, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989), (citing *Hensley*, 461 U.S. at 437, 103 S.Ct. 1933).

court, however; they won their case yet they received nominal fees.

Because the court erred in applying the special circumstances test in the case below, and because Harris County has now prevailed on one issue, we must vacate and remand the award of fees to allow the district court to award fees appropriate to plaintiffs' now partial success in both the district court as well as on appeal.[51]

We AFFIRM IN PART and REVERSE IN PART the district court's decision on the merits. We VACATE AND REMAND the district court's award of fees for further consideration.

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[51] *See Hensley*, 461 U.S. at 435, 103 S.Ct. 1933 (explaining that, under § 1988, a party cannot recover fees for legal services on unsuccessful claims, although sometimes unsuccessful and successful claims can be so related as to warrant fees for time spent on the combined claims).

400 F.Supp.2d 967

United States District Court, S.D. Texas,
Houston Division.
Carl R. PRUETT and Scott Martin, Plaintiffs,
v.
THE HARRIS COUNTY BAIL BOND BOARD
and Harris County Defendants.
No. CIV.A. H-03-3241.

May 20, 2005.

David A. Furlow, Thompson & Knight LLP, Houston, TX, for Plaintiffs.

George A. Nachtigall, Deputy Chief Trial Division, Houston, TX, for Defendants.

HOYT, District Judge.

I. INTRODUCTION

Pending before this Court are the plaintiffs' motion for summary judgment and the defendants' cross motion for summary judgment. This suit concerns the constitutionality of a Texas state law, TEX. OCC. § 1704.109, that forbids certain solicitations by bail bondsmen. The plaintiffs, Carl Pruett and Scott Martin, are bail bondsmen whose practices conflict with the recently enacted statute. They have challenged section 1704.109 on multiple Federal and state constitutional grounds, and have brought a claim for relief under 42 U.S.C. §§ 1983 and 1988. The defendants, the Harris County Bail Bond Board and Harris County, defend the state statute in lieu of the Texas

Attorney General, who declined to intervene in this case.

Procedural History

The plaintiffs filed the original complaint on August 13, 2003. This Court denied the plaintiffs' motion for temporary restraining order, preliminary injunction, and declaratory judgment on October 27, 2003. On December 22, 2003, this Court denied a motion to intervene filed by International Fidelity Insurance and Allegheny Casualty, a ruling affirmed on appeal to the Fifth Circuit. The parties filed the instant motions for summary judgment on September 20, 2004. After considering the motions, responses, the pleadings, and the applicable law, this Court determines that the plaintiffs' motion should be GRANTED in part and DENIED in part, and the defendants' motion DENIED in its entirety.

II. FACTUAL BACKGROUND

The plaintiffs are agents of corporate bail bond sureties whose methods of practice conflict with section 1704.109 of the Bail Bond Act. TEX. OCC. § 1704.109. Harris County, is a political subdivision of the State of Texas and the Harris County Bail Bond Board ("the Board"), created by Texas statute, is a body comprised of thirteen members. While neither defendant participated in the creation or enactment of section 1704.109, the Board is vested with enforcement authority. *Id.* at § 1704.103. The Legislature

passed section 1704.109 in June 2001, and it provides as follows:

> (a) a board by rule may regulate solicitations or advertisements by or on behalf of bail bond sureties to protect;
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> (1) the public from:
>
> (A) harassment;
>
> (B) fraud;
>
> (C) misrepresentation; or
>
> (D) threats to public safety; or
>
> (2) the safety of law enforcement officers.
>
> (b) A bail bond surety, an agent of a corporate surety, or an employee of the surety or agent may not make, cause to be made, or benefit from unsolicited contact:
>
> (1) through any means, including in person, by telephone, by electronic methods, or in writing, to solicit bonding business related to an individual with an outstanding arrest warrant that has not been executed, unless the bail bond surety or agent for a corporate surety has an existing bail bond on the individual; or
>
> (2) in person or by telephone to solicit bonding business:
>
> (A) that occurs between the hours of 9 p.m. and 9 a.m.; or

(B) within 24 hours after:

(i) the execution of an arrest warrant on the individual; or

(ii) an arrest without a warrant on the individual.

(c) This section does not apply to a solicitation or unsolicited contact related to a Class C misdemeanor.

Id.

Subsection (a) of the statute vests authority in the Board to further regulate on the basis of certain stated objectives, while subsection (c) excludes class C misdemeanors (relatively small offenses punishable by fine only). The plaintiffs challenge subsection (b) of the statute, which concerns unsolicited bail bondsman contact.

Subsection (b)(1) (hereinafter "the unexecuted warrant rule") prohibits bail bond agents[1] from soliciting, through "any means," business regarding an unexecuted (i.e., outstanding) arrest warrant. The statute provides an exception, however, for any agent who has an existing bail bond on the individual. On the other hand, subsection (b)(2) (hereinafter "the 24-hour rule") restricts the time during which an agent may solicit bail bond business after an arrest has

[1] Although the statute refers to "a bail bond surety, an agent of a corporate surety, or an employee of the surety or agent," for simplicity the Court will simply use the term "agent."

been made. It prohibits solicitations "in person or by telephone" that occur between the hours of 9:00 p.m. and 9:00 a.m., or within 24 hours after an individual has been arrested. The 24-hour rule contains no exception for bail bondsmen with existing bail bonds on an individual. Hence, a bondsman violates section 1704.109 by making phone calls on unexecuted arrest warrants within the prohibited time windows.

Bail bondsmen use many methods to solicit business, and a given bail bondsman may utilize any combination of methods for solicitation. One particularly useful tool for soliciting bail bond business is the Harris County Justice Information Management System ("JIMS"). JIMS gives speedy access to names and addresses of arrestees and subjects of warrants. As a result, Harris County delays by 48 hours the posting of information on an individual subject to an arrest warrant, allowing law enforcement officers an opportunity to execute the warrant. The information in JIMS is public information.

The statute, however, does not prevent attorneys or law enforcement officials from alerting an individual to the fact that he is the subject of an arrest warrant. Thus, attorneys and law enforcement officials may send letters notifying an individual of an outstanding warrant. In addition, law enforcement officials may issue press releases announcing the issuance of arrest warrants. Because the information in JIMS is public and the statute applies only to bail bondsmen, any individual, including a lawyer, could obtain information about unexecuted warrants and

gratuitously notify the subject without violating the statute.

No legislative history accompanies section 1704.109, and the parties have sought to create a record primarily through affidavits. The defendants admit that they have no actual knowledge of any information that the Legislature relied upon when it enacted section 1704.109. The defendants, however, proffer complaints filed with the Board that they readily admit may not have been before the Texas Legislature. The complaints pertained to bail bondsmen making phone calls in the late night/early morning hours and bail bondsmen calling the subjects of unexecuted warrants "tipping" them off. Arguably, this permitted the subject to flee or potentially harm others. Nevertheless, the complaints led the Board to adopt Local Rules 24 and 25, which share many similarities with section 1704.109.[2]

III. CONTENTIONS OF THE PARTIES

The plaintiffs have sued the defendants claiming that section 1704.109 violates a litany of state and federal constitutional provisions, including the First, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 3, 8, 11, 13, 19 and 29 to the Texas Constitution.[3]

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[2] Texas courts reviewed the local rules. *See* footnote 3, infra.

[3] The Court is aware of the state court ruling in *Harris County Bail Bond Bd. v. Pruett*, No. 01-02-01043-CV, 2004 WL

(Continued on following page)

Specifically, under the United States Constitution, the plaintiffs contend that the statute violates their free speech rights under the First Amendment. In the alternative, the plaintiffs contend that the statute is void for vagueness under the First and Fourteenth Amendments, that it violates Equal Protection principles and that it abridges the plaintiffs' and their customers' right to counsel under the Sixth Amendment and their right to be free from excessive bail under the Eighth Amendment. The plaintiffs also seek injunctive relief for the violation of their civil rights pursuant to 42 U.S.C. § 1983 and for attorney fees pursuant to 42 U.S.C. § 1988.

IV. STATEMENT OF THE LAW

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions

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2307362 (Tex.App. – Houston [1 Dist.] October 14, 2004, no pet. h.) (involving a local Harris County Bail Bond Board Rule very similar to § 1704.109). This Court abstains from ruling on Texas Constitutional questions. *See Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Nevertheless, because the federal constitutional rulings are not "effectively advisory," the Court proceeds with the case. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987); *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 813, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) (noting that a court should normally hear federal constitutional challenges because abstention is an "extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it").

on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to . . . judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of "informing the Court of the basis of its motion" and identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Once the moving party meets its burden, the nonmoving party must "go beyond the pleadings" and designate "specific facts" in the record "showing that there is a genuine issue for trial." *Id.* at 324, 106 S.Ct. 2548. Throughout the analysis, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *See id.* at 247-49, 106 S.Ct. 2505. A failure on the part of the nonmoving party to offer proof concerning an essential element of its case necessarily renders all other facts immaterial and mandates a finding that no genuine issue of fact exists. *See Saunders v. Michelin Tire Corp.,* 942 F.2d 299, 301 (5th Cir.1991).

This case involves the interpretation of a Texas statute and, as such, the Court refers to Texas law on statutory interpretation. Statutes are interpreted as a matter of law. *Bragg v. Edwards Aquifer Auth.,* 71

S.W.3d 729, 734 (Tex.2002). The primary purpose of statutory interpretation is to determine the legislature's intent. *Cont'l Cas. Co. v. Downs,* 81 S.W.3d 803, 805 (Tex.2002). Hence, the plain meaning of the words used by the Legislature is the strongest indicator of its intent. TEX. GOV'T CODE ANN. § 311.011 (Vernon 2004); *Argonaut Ins. Co. v. Baker,* 87 S.W.3d 526, 529 (Tex.2002).

The First Amendment, as applied to the states through the Fourteenth Amendment, protects speech from undue government restraint. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N. Y.,* 447 U.S. 557, 561, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). However, all speech is not equal. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 758-59, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985); *see also Id.* at 562, 100 S.Ct. 2343 (citing, *inter alia, Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447, 455-456, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978)). While pure political expression is afforded strong protection, and obscene speech is afforded no protection, commercial speech receives a form of intermediate protection. *See, e.g., Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 623, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995); *Edenfield v. Fane,* 507 U.S. 761, 767, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). Hence, the burden is on the government to justify a restraint on free speech, which burden varies, depending on the context of the speech. *See Id.*

Protected commercial speech is characterized as "truthful, non-deceptive information proposing a lawful commercial transaction." *Edenfield,* 507 U.S.

at 765, 113 S.Ct. 1792. However, all speech, including personal solicitations, must ultimately be assigned a level of protection correlative of "the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) (holding that solicitation of charitable contributions is "inextricably intertwined with otherwise fully protected speech" and thus merited heightened protection). The general framework for scrutinizing the majority of commercial speech is set forth in *Central Hudson,* 447 U.S. at 564, 100 S.Ct. 2343 (1980).

Under the threshold inquiry of *Central Hudson,* courts determine whether the commercial speech concerns unlawful or misleading activity. *Id.* at 563-564, 100 S.Ct. 2343. If the speech concerns unlawful or misleading activities, it may be freely regulated; otherwise, courts consider the speech under *Central Hudson's* three-pronged analysis. *Id.* at 564, 100 S.Ct. 2343. First, the government must put forth a substantial interest in support of its statute; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be narrowly drawn. *Id.* at 564-565, 100 S.Ct. 2343.

Even if a statute does not violate Free Speech principles, it is void for vagueness when its "prohibitions are not clearly defined." *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). A person is entitled to know what

conduct is prohibited and accepted. *Id.* Thus, when a statute might inhibit a constitutionally protected right, it is subject to thorough review. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) ("perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights").

The Fourteenth Amendment guards citizens against unfair treatment by the state. When an individual is not the subject of a protected class, and the right impinged is not a fundamental right, the appropriate standard is rational basis review. *Heller v. Doe,* 509 U.S. 312, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). Rational basis review asks whether there is a "relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* at 320, 113 S.Ct. 2637. "On rational-basis review, a . . . statute . . . comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to [negate] every conceivable basis which might support it." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-15, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) (citations omitted).

To state a cause of action under 42 U.S.C. § 1983, a plaintiff must allege a violation of a right secured by the Constitution or laws of the United States and demonstrate that a person acting under "color of state law" committed the alleged deprivation. *Moore v.*

Willis Indep. Sch. Dist., 233 F.3d 871, 874 (5th Cir.2000). Government entities may be held liable under § 1983 for constitutional violations only if the violation represents a governmental policy or custom. *Monell v. Dept. of Soc. Servs. of New York,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Collins v. City of Harker Heights,* 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) (finding that municipal liability under § 1983 requires the plaintiff to show that the harm was caused by a constitutional violation and that the municipality is responsible for that violation).

V. APPLICATION OF THE LAW

The speech challenged in this case is commercial speech. A bail bondsman's solicitation merely proposes a commercial transaction. Although the result of a consummated business transaction may be to avoid arrest or get out of jail, the sole purpose of contacting the potential client is to secure business. The fact that the business that a bail bondsman pursues coincidentally involves constitutional rights does not propel the speech to a higher level of First Amendment protection. Indeed, the Supreme Court's decision in *Went For It* is instructive. There the involved statute implicated numerous constitutional rights and the Supreme Court had no trouble identifying lawyer solicitations as purely commercial. *See* 515 U.S. at 620-21, 623, 115 S.Ct. 2371 (involving a constitutional challenge to a Florida Bar rule that prohibited attorneys from using direct mail advertisements to

solicit wrongful death and personal injury clients within thirty days of the accident or disaster causing death or injury); *see also Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 459, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) ("A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the state's proper sphere of economic and professional regulation.").

Contrary to the plaintiffs' arguments, the speech in this case is not "inextricably intertwined with otherwise fully protected speech," as in the case of *Riley v. Nat'l Fed'n of the Blind,* 487 U.S. at 796, 108 S.Ct. 2667. *Riley* involved a for-profit company that solicited charitable contributions on behalf of non-profit charities. *Id.* Solicitation of charitable donations is a narrow exception to the commercial speech rule. However, the facts of the case at bar do not remove bail bondsman speech from the ambit of commercial speech. *See id.*; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983).

The plaintiffs also urge that a test more stringent than *Central Hudson* should apply The Supreme Court has yet to overrule or modify the *Central Hudson* analysis for a case such as this. *Thompson,* 535 U.S. at 367, 122 S.Ct. 1497 ("Although several members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases . . . there is no need in this case to break new ground. *Central Hudson,* as applied

in our more recent commercial speech cases, provides an adequate basis for decision."); *see also U.S. West, Inc. v. Fed. Communications Comm'n,* 182 F.3d 1224, 1234 n. 5 (10th Cir.1999). Because there is no contention that the solicitations by bail bondsmen concern illegal activity or would be misleading, the three-pronged analysis of *Central Hudson* applies 447 U.S. at 566, 100 S.Ct. 2343.

First Prong of Central Hudson

It is clear that the defendants may justify the governmental restraint on speech only with those "asserted interests" offered at the origination of the statute or rule. *Edenfield,* 507 U.S. at 768, 113 S.Ct. 1792 ("the *Central Hudson* standard does not permit [the Court] to supplant the precise interests put forward by the state with other suppositions"). The plaintiffs contend that, because no legislative history exists, the defendants lose on this point because neither the defendants nor the Court can bring forth new interests. While the plaintiffs pinpoint a problem in the lack of legislative history – a problem that will be addressed in turn – they either misread *Central Hudson's* first requirement or fail to realize the primary manner in which the state asserts its "substantial interests."

The first prong of *Central Hudson* requires that the state assert a substantial interest to be served by the statute. 447 U.S. at 566, 100 S.Ct. 2343. It is an elementary principle of statutory interpretation that

the statute itself provides the best evidence of the state's intent. TEX. GOV'T CODE ANN. § 311.011 (2004); *Argonaut Ins. Co. v. Baker,* 87 S.W.3d 526, 529 (Tex.2002). In this case, the state's asserted interest are to protect the public from harassment, fraud, misrepresentation, and threats to public safety and to protect the safety of law enforcement officers. § 1704.109(a). Separately or collectively these interests are substantial. However, both may be and are freely protected. It is when the state's interest seeks to regulate activity that is not misleading or illegal that greater scrutiny is required. 447 U.S. at 566, 100 S.Ct. 2343. The asserted interest of protecting the public from "harassment," therefore, merits closer study.

Section 1704.109 covers both in-person (telephone or face-face) and impersonal (mailings, etc.) solicitations. It is true that in-person solicitations are a cause for greater concern than mail-in solicitations because the danger of harassment is greater. *Shapero v. Kentucky Bar Assn.,* 486 U.S. 466, 475, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988) ("the mode of communication makes all the difference."). However, while in-person solicitations in general may be bothersome to the recipient, the mere fact that a person may be bothered or annoyed does not justify restraint. *See, e.g., International Society for Krishna Consciousness v. Lee,* 505 U.S. 672, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992) (soliciting contributions in airports); *Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983) (direct mail advertisements for

contraceptives). On the other hand, "solicitation that is neither fraudulent nor deceptive may be pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient." *Edenfield,* 507 U.S. at 769, 113 S.Ct. 1792. Because solicitation may be pressed too vigorously, the "protection of the public from these aspects of solicitation is a legitimate and important state interest." *Ohralik,* 436 U.S. at 462, 98 S.Ct. 1912. Hence, the conduct of bail bondsmen may be circumscribed only when they reach beyond normal solicitation to the point of objective harassment.

Second Prong of Central Hudson

The second prong of *Central Hudson* requires the defendants to demonstrate that the restrictions on commercial speech directly and materially advance each interest. 447 U.S. at 564-565, 100 S.Ct. 2343. The regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. *Id.* Hence, the burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. *Edenfield,* 507 U.S. at 770-71, 113 S.Ct. 1792.

The plaintiffs have repeatedly urged that the defendants cannot sustain their burden under this prong because the defendants have no knowledge of

the evidence that the Texas Legislature considered when enacting this law. The Texas Attorney General declined to intervene in this case to defend the state statute and there is no legislative history. As a result, the defendants' justifications for the enactment of section 1704.109 have been created *post-hoc,* without any suggestion that the Texas Legislature was cognizant of the evidence now presented. Hence, the issue is whether a defendant, without any knowledge of the evidence that was before the state Legislature when a law is adopted can sustain his burden of justifying a restraint on commercial speech with evidence that is admittedly generated after the enactment of the statute. The Court holds that the defendants cannot.

The policy behind the First Amendment is clear that speech should be restrained as a last resort, and that a substantial burden must be overcome when the government seeks to restrain commercial speech. Therefore, restraint that is based on mere conjecture or guessing is prohibited. *Id.* A statute restraining commercial speech must be justified by evidence that was before the Legislature at the time that the statute was adopted. *See Moore v. Morales,* 63 F.3d 358, 362 (5th Cir.1995). ["*Florida Bar* does not require an overwhelming record in support of the 30-day ban. Rather, it echoed prior precedent requiring only that there be more than 'mere speculation and conjecture.'"] The evidence need not be overly burdensome,

but rather it must be proportional to the speech it will affect.[4]

Even assuming that the defendants' belated proffered evidence merits consideration, it as insufficient to demonstrate that the restrictions on commercial speech directly and materially advance each interest identified. Specifically, there is no evidence that the solicitations were fraudulent or resulted in misrepresentation. Hence, there is no purpose to be advanced. And, limiting the times during which a bail bondsman may contact an individual or his family does nothing to prevent fraudulent behavior. Therefore, the actual interest of the government is not apparent. A court will not "turn away if it appears that the stated interests are not the actual interests served by the restriction." *Edenfield,* 507 U.S. at 768, 113 S.Ct. 1792 (citing *Mississippi Univ. for Women v.*

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[4] The Court takes notice of areas of law requiring some evidentiary justification for an enacted law, especially First Amendment cases involving regulation of sexual-oriented businesses. *See, e.g., City of Los Angeles v. Alameda Books,* 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002); *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 51, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (involving zoning of sexual oriented businesses; some evidence of secondary effects is required, although one city can rely on another city's evidence). *See also, Kassel v. Consolidated Freightways Corp. of Del.,* 450 U.S. 662, 671, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981) (involving the regulation of highway safety under the commerce clause; statistics and studies presented by the state "failed to present any persuasive evidence that 65-foot doubles [18-wheelers] are less safe than 55-foot singles").

Hogan, 458 U.S. 718, 730, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982)).

Another professed purpose of the statute is to limit harassment. The defendants offer evidence that harassment occurs when, after a person is arrested and this information becomes available to bail bondsmen, multiple independent[5] bondsmen contact the family of the arrestee to notify the family of potential bail bond services. These contacts are made by telephone and may occur at any hour. However, there is no evidence to support the conclusion that when the opportunity presents, multiple calls do not occur. The statute does not prevent multiple calls from occurring. The statute merely prohibits calls during the 24 hours after arrest. Nothing prevents 30 separate phone calls from bail bondsmen after the 24-hour period has expired. Thus, the 24-hour prohibition does not pass constitutional muster.

In addition, there is no evidence that the family would prefer to forgo the knowledge of a family member's arrest during the 24 hours following an arrest. While the defendants argue that "common sense" helps to justify this restraint, common sense likewise counsels that family members want to know the whereabouts of a loved one and secure legal

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[5] The defendants are unclear whether they complain about one bondsman calling "20-40 times," or 20-40 bondsmen calling one time each. Because a rule can easily be made limiting each bondsman to one call per arrestee, the Court assumes the complaint pertains to multiple, independent bondsmen.

representation, if appropriate. In this sense, both the First and Sixth Amendments weigh against the statute. The defendants also offer affidavits that citizen complaints were reduced after the implementation of a similar local rule. However, that evidence fails to account for the number of citizen complaints before the legislation was enacted and the nature of those complaints.

Although TEX. BUS. & COM. CODE § 37.02(a)(2) (2002) prohibits telephonic solicitation from 9:00 p.m. to 9:00 a.m., the code covers only people soliciting a "consumer good or service," such as solicitation for the sale of real and personal property, or a service related to real or personal property. *Tex. Prac. Guide Bus. & Com. Litig.,* Ch. 32XIII, §§ 32:209-10 (citing TEX. BUS. & COM. CODE ANN., §§ 37.01(2), 37.01(3)). Thus, the Act does not apply to the solicitation of bail bonding services.

The final proffered purpose for the statute is preserving the safety of the public and of law enforcement officers by prohibiting bail bonding companies from soliciting persons who are the subject of an unexecuted arrest warrant. In the abstract, the justification appeals to common sense. Executing a warrant, a potentially dangerous event, is arguably safer when the officers have the element of surprise. Similarly, a defendant who is arrested before he is aware that a warrant is outstanding will have little opportunity to flee or obstruct justice. However, there is no data showing that in those instances where a person becomes aware of an outstanding warrant

they flee or obstruct justice. Likewise, there is no evidence of an occurrence involving an arrestee who, after being alerted to an existing arrest warrant by a bail bondsman, subsequently injured an officer.

Finally, the facts illustrate that law enforcement officers and attorneys contact subjects of unexecuted arrest warrants without notable events. While common sense dictates that there exists the possibility that an individual might flee or hurt an officer, it is not based on substantial evidence. In this case, common sense will not justify the restraint on speech.

Third Prong of Central Hudson

The final prong of *Central Hudson*, whether the statute is narrowly drawn, does not require that the statute be drawn as narrowly as possible. Rather, courts ask whether "the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech" while still effectively serving the same interests. *Thompson* 535 U.S. at 371, 122 S.Ct. 1497. In this case, the Court notes that there are numerous alternatives to the total prohibition against contact with subjects of unexecuted arrest warrants. For instance, the county could increase the number of officers executing arrest warrants, thereby arresting risky offenders before the 48-hour JIMS window expires. Alternatively, officers could extend the JIMS blackout period from 48 hours to some longer period in order to give authorities enough time to execute the risky warrants. The

prohibition against bail bondsmen solicitation could be limited to certain categories of risky arrest warrants (e.g., those for crimes of violence). According to the defendants, law enforcement officers have a screening mechanism that identifies which individuals get notified about unexecuted warrants. The same screening mechanism could be utilized by bail bondsmen. Such an arrangement would prevent risky "tip-offs" while allowing others to avoid an embarrassing arrest.

The Court's purpose is not to micromanage state law, but rather to be mindful that, "[i]f the First Amendment means anything, it means that regulating speech must be a last – not first – resort." *Thompson* 535 U.S. at 373, 122 S.Ct. 1497. *See also Utah Licensed Beverage Ass'n v. Leavitt,* 256 F.3d 1061, 1073-75 (10th Cir.2001) (holding that the government could not justify its speech regulations as directly and materially advancing state interests where the regulatory scheme was irrational and the government failed to demonstrate that the harms it recited were real or that the regulations would materially reduce those harms); *U.S. West, Inc.,* 182 F.3d at 1237 (holding the FCC could not justify its restriction on speech with mere conjecture – it could not demonstrate that the harms it recited were real and that the restriction would in fact alleviate those harms to a material degree where the government simply pointed to).

The Plaintiffs' § 1983, Void for Vagueness and Equal Protection Claims

Having concluded that the statute is unconstitutional, the defendants in this case are liable under 42 U.S.C. § 1983 for depriving the plaintiffs of their constitutional rights. A state statute, like the one in this case, is unquestionably the result of state action. *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 941, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). Similarly, a state official who acts, or would act, pursuant to a state statute is a state actor for the purposes of section 1983. *See id.*; *Carhart v. Stenberg,* 192 F.3d 1142 (8th Cir.1999). The appropriate remedy however is not damages but injunctive relief. Therefore, the Court holds that the defendants should be enjoined from enforcing the statute. *See Kolender v. Lawson,* 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

The plaintiffs have advanced other bases for holding the statute unconstitutional. They argue that the statute is void for vagueness and that it violates the "equal protection" clause of the Fourteenth Amendment as it distinguishes between bail bondsmen who have existing bond(s) with an accused and those who do not. The Court need not address these contentions in light of its holding.

VI. CONCLUSION

For the reasons stated, the Court finds that the plaintiff's motion for summary judgment is GRANTED in part and DENIED in part, and the

defendants' motion is DENIED. The Court HOLDS that the statute is unconstitutional and that the defendants are ENJOINED from enforcing it. The plaintiffs' claim for an attorneys' fee and costs is to be submitted to the Court on or before May 31, 2005. The defendants' response is due on or before June 10, 2005.

It is so ORDERED.

United States District Court,
S.D. Texas, Houston Division.
Carl R PRUETT, et al, Plaintiffs,
v.
HARRIS COUNTY BAIL BOND BOARD, et al, Defendants.
No. Civ.A.H-03-3241.

July 20, 2005.

David A. Furlow, Thompson & Knight LLP, Houston, TX, for Plaintiffs.

George A. Nachtigall, Deputy Chief Trial Division, Houston, TX, for Defendants.

HOYT, J.

Before the Court is the plaintiffs' motion to recover an attorney's fee, expert witness fees and expenses, the plaintiffs' motion to withdraw their claim for estimated future fees and the defendants' response. The Court has reviewed the motions and is of the opinion that the motion to recover an attorney's fee and expenses should be granted in part and denied in part; and the motion to withdraw claim for future future attorney's fees should be granted without comment.

The plaintiffs have requested attorney's fees and costs of $197,895.73 and have provided affidavits for the reasonableness and necessity of the fees and expenses. The defendants' response to the request is two-fold. First, the defendants argue that the case challenges the constitutionality of a state statute that

was not sought or enforced by Harris County and the Bail Bond Board. In this instance, the defendants contend that the circumstances render the award of attorney's fees and costs unjust. The defendants cite to *Hensely v. Eckerhart* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) as authority. Second, the defendants argue, if the Court were to award fees and costs, the Court should recognize that the plaintiffs' request is excessive, redundant or otherwise unnecessary in several respects. Based on these expenses [efforts to block intervention by International Fidelity Insurance Company, the Texas Attorney General] the defendants assert that any fee awarded should be reduced by $20,085.00.

The Court agrees with the defendants in several respects. While the Court does not question the propriety or extent of the plaintiffs' request, the Court is concerned with the issue of whether any award should be made against the defendants. Hence, the Court is of the opinion that the Court should award only nominal fees in light of the fact that: (a) Harris County is not involved in the regulation of bail bondsmen; (b) the Harris County Bail Bond Board is not a policy making body; it merely enforces the laws and policies of the state of Texas; and (c) neither Harris County nor the Bail Bond Board enforced the statute against the plaintiffs.

Therefore, the Court is of the opinion that an attorney's fee of $50,000 plus costs of court should be awarded. However, in the event of an appeal of the

judgment entered in the case, the Court awards an additional $25,000 in attorney's fees.

It is so ordered.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARL R. PRUETT, *et al*,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	H-03-3241
HARRIS COUNTY BAIL BOND BOARD, *et al*,	§	
	§	
	§	
Defendant.	§	

FINAL JUDGMENT

Pursuant to the Memorandum Opinion and Order entered in this case [#67], the defendants, Harris County Bail Bond Board and Harris County, Texas are ENJOINED from enforcing Tex. Occ. Code Ann. § 1704.109. The plaintiffs' are also awarded an attorney's fee in the amount of $50,000 plus costs of Court. In the event of an appeal, the plaintiffs are awarded an additional attorney's fee of $25,000. Interest shall accrue on the $50,000 award at the rate of 1.59% per annum.

This is a Final Judgment.

SIGNED and ENTERED this 20th day of July, 2005.

/s/ Kenneth M. Hoyt
Kenneth M. Hoyt
United States District Judge

STATUTORY PROVISIONS INVOLVED

TEX. OCC. CODE ANN. § 1704.109

(a) A board by rule may regulate solicitations or advertisements by or on behalf of bail bond sureties to protect:

(1) the public from:

(A) harassment;

(B) fraud;

(C) misrepresentation; or

(D) threats to public safety; or

(2) the safety of law enforcement officers.

(b) A bail bond surety, an agent of a corporate surety, or an employee of the surety or agent may not make, cause to be made, or benefit from unsolicited contact:

(1) through any means, including in person, by telephone, by electronic methods, or in writing, to solicit bonding business related to an individual with an outstanding arrest warrant that has not been executed, unless the bail bond surety or agent for a corporate surety has an existing bail bond on the individual; or

(2) in person or by telephone to solicit bonding business:

(A) that occurs between the hours of 9 p.m. and 9 a.m.; or

(B) within 24 hours after:

(i) the execution of an arrest warrant on the individual; or

(ii) an arrest without a warrant on the individual.

(c) This section does not apply to a solicitation or unsolicited contact related to a Class C misdemeanor.

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42 U.S.C. § 1988(b)

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.